83-224

No. _____

In The

Supreme Court of the United States

October Term, 1982

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ADAMS CENTRAL SCHOOL DISTRICT NO. 090, ADAMS COUNTY, NEBRASKA, AND EDUCATIONAL SERVICE UNIT NO. 9,

Petitioners,

vs.

MARVIN DEIST AND MYRTLE DEIST,

Respondents.

IMPLEADED WITH NEBRASKA DEPARTMENT OF EDUCATION,

Respondent.

---o---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

---o---

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Education Of All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.*, allow the granting of money damages to the parents of a handicapped child, who assert successfully that the resident school district of the handicapped child has failed to provide a free appropriate education for the child?

2. Are money damages and compensatory education identical elements of damage in a case under 20 U.S.C. 1401 §§ *et seq.*, when the parent of a handicapped child successfully asserts a resident school district has not provided a free appropriate public education for the handicapped child?

LIST OF PARTIES

Adams Central School District No. 090, Adams County, Nebraska, and Educational Service Unit No. 9, Petitioners.

Marvin Deist and Myrtle Deist, Respondents.

Nebraska Department of Education, Respondent.

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To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States

The petitioners herein pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in the above entitled action on May 13, 1983.

OPINIONS

Adams Central School Dist. v. Deist, 214 Neb. 307, ____ N.W.2d ____ (1983).

For the Complete text of opinion, see Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was entered on May 13, 1983. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 2101 and United States Supreme Court Rule 17.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, REGULATIONS AND ORDINANCES

Constitution of the United States, Eleventh Amendment.

45 C.F.R. §§ 121a.194, .220, .302, .320, .513 and .551.

Nebraska Revised Statutes §§ 43-625 and 43-626 (Reissue 1978).

20 U.S.C. § 1414.

For complete texts, see Appendix B.

STATEMENT OF THE CASE

This case commenced as an administrative hearing brought by the parents of a multi-handicapped child for purposes of modifying an individualized educational plan (IEP) for the child. The child had been placed pursuant to an IEP in the fall of 1977 with Educational Service Unit No. 9 (hereafter referred to as

the ESU), which provided services to him pursuant to a contract with his resident school district, Adams Central School District No. 090. During December 1977, the child became violent and repeatedly struck the teacher and other students in the class. Several days before Christmas vacation his violence necessitated his removal from the specialized school. His parents were consulted within the day following his removal in a quest for another setting which was more restrictive but still appropriate for the student. This quest was not successful before Christmas vacation began, and when during the course of Christmas vacation the child became destructive of his parents' home, they placed him in a state operated mental institution known as the Hastings Regional Center. With the reconvening of school after the Christmas vacation, diagnostic teams reviewed the circumstances of the Deist boy, and the ESU, pursuant to the terms of its contract, began providing "homebound" services for the boy to the maximum the ESU believed possible taking into consideration that he was under a course of heavy drug therapy.

After a period of approximately 16 months spent by the Deist boy at the Regional Center, because the Nebraska Department of Education would not approve any residential placement outside of the State of Nebraska and because no state institution within the State of Nebraska could be found for placement, the parents, without notice to the resident school district or the ESU, removed the child from the Hastings Regional Center and placed him in a short-term psychiatric care facility known as the Nebraska Psychiatric Institute (NPI). While he was at NPI, his parents commenced a due process action seeking an IEP with a residential placement which they believed to be

required for their son. After a hearing, the hearing officer entered an order awarding the parents, among other things, 16 months of compensatory education and the right to placement in a residential care facility within the school district, although none existed at the time of the entry of his order. The hearing officer further ordered the school district to pay all of the expenses for the period when the Deist boy was at HRC and NPI. The school district had been paying under a contract with NPI approximately $900.00 per month for educational services for the Deist boy, but the hearing officer's order directed the school district to pay the difference between that sum and the approximately $4,000.00 per month cost for the care for the child at NPI.

An appeal was taken from the hearing officer's order by the school district and the ESU to the District Court of Adams County, Nebraska, under an appeal procedure which provides for an appeal *de novo* on the record. The District Court had the issues presented to it by the Amended Petition For Review of the school district and the ESU, a copy of which is incorporated herein as Appendix C. The District Court entered an order reversing the hearing officer's final decision and order in all respects, except that the District Court ordered the school district and the ESU to provide services should the Deist boy return to his resident school district in Hastings, Nebraska, and further ordered the parents to notify either the ESU or the school district of their intentions to return their son within forty days of the entry of the Court's order.

Thereafter, the parents took their appeal from the District Court order to the Supreme Court of Nebraska. As appellees, the petitioners herein raised in their

fourth argument the proposition that the Education Of All Handicapped Children Act "does not imply that costs (for services for handicapped children) be borne by a local school district, nor does it imply any private cause of action for damages." Appellees' brief in Case No. 81-773 in the Supreme Court of Nebraska, page 20. Thereafter, the Supreme Court of Nebraska held in its opinion, found herein as Appendix A, that the school district was obligated to pay for two placements, the one at HRC and the one at NPI, notwithstanding that neither the school district nor the ESU was notified of the parents' move of their child to those institutions. The Supreme Court of Nebraska held that the child was not entitled to compensatory education, but it did allow as damages the costs of the placements made by the parents contrary to the IEP, which had been signed by the student's mother back in 1977. A timely Motion For Rehearing and a Brief In Support thereof were filed in the Supreme Court of Nebraska by petitioners herein, assigning as errors:

> 10. The Court erred in finding that a private right for a cause of action in money damages exists in the parents of a special education child under the Education Of All Handicapped Children Act.
>
> 11. The Court erred in not recognizing that "compensatory education" and money damages are identical elements of damages within the context of the Education Of All Handicapped Children Act.

The State of Nebraska, the School District of Omaha and the Nebraska Association of School Boards were granted leave to file a Brief of *amicus curiae* in support of appellees' Motion For Rehearing essentially asserting, among other matters, that "monetary recov-

eries to reimburse parents for self-help actions to protect their handicapped children, if any there be, are not available under federal law in the circumstances of this case". *Amicus curiae* brief, page 18.

The Motion For Rehearing has not been ruled upon by the Supreme Court of Nebraska.

ARGUMENT

Monetary damages are not authorized under the Education Of All Handicapped Children Act.

The case of *Adams Central School District No. 90 v. Deist*, 214 Neb. 307, ____ N.W.2d ____ (1983), is a case of first impression in the state courts of Nebraska. The issue whether money damages are authorized by the Education Of All Handicapped Children Act, however, has previously been addressed by the Eighth Circuit Court of Appeals in a Nebraska case.

In *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982), Monahan had removed his son from the Omaha Public Schools and placed him in a program for handicapped children of his own choosing. One of the issues litigated was the entitlement of the father of the handicapped student to reimbursement for his expenditures. In *Monahan*, as in the *Deist* case, the student in question was placed in the program chosen by one of his parents before the invocation of the impartial hearing process provided by state law. The Eighth Circuit in *Monahan* refused to grant any reimbursement to Monahan and stated: "The District Court, citing *Stemple v. Board of Education*, 623 F.2d 893, 897 (4th Cir. 1980), held that damages are not re-

coverable for the costs of tuition at a school voluntarily selected by the parents. We cited *Stemple* approvingly in our first opinion in this case, 645 F.2d at 598, and we have now held, in any event, that there is no private right of action for damages under EEAHCA, except perhaps in exceptional circumstances not present here. *Miener v. Missouri*, 673 F.2d 969, 979-80 (8th Cir. 1982)." *Id.* at 1169.

The Eighth Circuit in *Monahan* went on to assess this Court's decision in *Board of Education v. Rowley*, ___ U.S. ___, 102 S. Ct. 3034, 73 L. Ed. 2d (1982), wherein this Court pointed out that the Education Of All Handicapped Children Act primarily is a procedural statute and does not impose a substantive duty to maximize each handicapped child's personal development. In *Rowley*, this Court stated that the "Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the states any greater substantive educational standard than is necessary to make such access to public education meaningful." *Id.* at 3043; and that the Act's intent was "more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside." *Id.* at 3043.

Rowley, in turn, has a counterpart case in *Pennhurst State School v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). In *Pennhurst* a developmentally disabled person under the Developmentally Disabled Assistance and Bill Of Rights Act of 1975, 42 U.S.C. §§ 6000 *et seq.*, asserted the state had a duty to provide services in the "least restrictive treatment" possible. The Third Circuit in addressing this issue

imposed certain obligations on the state to provide at its own expense certain kinds of treatment on the basis that Congress intended in the Act to create enforceable rights and obligations. This Court overturned the Third Circuit decision and found that the explicit purpose of the Act was "to assist" the states through the use of federal grants in improving the care and treatment of the mentally retarded. This Court went on to state that "Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it." *Id.* at 7.

This Court also stated that the Act in question in *Pennhurst* was for the purpose of establishing "a national policy to provide better care and treatment to the retarded and to create funding incentives to induce the states to do so. But the Act does no more than that. We would be attributing far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment." *Id.* at 31-32.

The applicability of *Pennhurst* to the instant case is apparent from this Court's reference to the fact that Congress in recent years has enacted civil laws designed to improve the way in which this nation treats the mentally retarded, enumerating at footnote 25 to that observation the Education For All Handicapped Children Act of 1975.

The significance of *Pennhurst* is that it places into proper perspective the law as it relates to the present case. A school district only is required to provide such services as are available and affordable, and

there is no requirement that the school district or its servicing agency go beyond that.

Another case on point from the Eighth Circuit is *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982). In that case the court was asked to address the question whether damages are available under the Education Of All Handicapped Children Act. In *Miener* the student, the victim of a brain tumor, suffered from serious learning disabilities and behavioral disorders. The student alleged that she was a voluntary resident at facilities of the Missouri Department of Mental Health for three years. She then was transferred to a private facility. She claimed that she was deprived of an appropriate free education during her three year stay in the state facilities in violation of the Education Of All Handicapped Children Act, 20 *U.S.C.* § 1401. She sought damages for deprivation of her constitutional right and her statutory right to a full and adequate education. The Eighth Circuit joined the Seventh Circuit [*Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981)] in holding that the Act does not authorize damages.

It appears from this Court's decision in *Pennhurst* and *Rowley*, that *Monahan* and *Miener* are correct. If federal funds to the states are to be properly and adequately used for the benefit of the intended beneficiaries of the funds, then those funds should not be depleted by persons who become displeased with a school district's adequacies, abilities and success in placements for handicapped children, make their own placements and send the school district the bills. To allow the *Deist* decision to stand in the face of *Monahan* and *Miener* will cause all school districts in Nebraska to have no definite body of law which they

can follow. The federal courts have said there is no obligation to reimburse parents who make placements of their own children; and there is nothing in either *Miener* or *Monahan* which indicates that, if after the fact of review, it is determined that the child was not in an adequate program (as one must of necessity assume the Supreme Court of Nebraska concluded), then the parents are entitled to reimbursement. To allow such a rendition of federal statutes to stand under state court application would cause and permit the State of Nebraska to impose a standard of strict liability, or at the very least a standard of extraordinary care, on school districts for all handicapped students. In other words, if after the fact and before any impartial hearing is convened on the matter, services are provided for a student which after a hearing are determined to have been inadequate, then the school district would have to pay for a placement unilaterally made by the parents. Such a rule in Nebraska by the Supreme Court of Nebraska indicates to parents of handicapped children that they may do as they please concerning the placement of their children and require the school districts to pay for those placements. Meanwhile, the federal courts governing the same state, the same department of education, the same school districts and the same parents, hold that it is clearly impermissible under both the federal statutes and the federal regulations to engage in such conduct.

Moreover, the decision in *Deist* vitiates the United States Supreme Court's application of *Pennhurst*, *supra*, wherein it is clear that the federal funds are forwarded to the states for purposes of precipitating innovation and to serve as a catalyst for progressive planning for the handicapped. Under the holding in *Deist*, the most expeditious position a school district could

take would be to assert it is unable to provide under the then circumstances for a particular student, and thereafter cease and desist from all efforts to make an appropriate placement for fear that, if it failed, it would receive the bill for the parents' effort. See 20 U.S.C. § 1414(d). A corollary of that position is that funds that can be expended on further efforts to provide a more adequate service for those who are severely handicapped will be depleted to pay for a form of alleged past educational malpractice. Such a result is neither contemplated, nor stated, nor fairly implied from the Education Of All Handicapped Children Act.

It is inconsistent to hold that the Education Of All Handicapped Children Act does not provide for an award of compensatory education, and at the same time award money damages, since they are identical forms of relief.

In *Miener, supra*, the plaintiffs sought money damages for the deprivation of a claimed right to "full and adequate education" and for compensatory relief in the form of additional education. The Eighth Circuit, however, held that neither of these forms of relief were authorized by the Education of All Handicapped Children Act. Rather, that the appropriate relief under the Act generally was intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the handicapped child. 673 F.2d at 979.

In reaching the above conclusions in *Miener*, the Eighth Circuit considered, but did not adopt, the

dictum of the Seventh Circuit in *Anderson*, *supra*, that some limited damage award might be appropriate if there was a risk to the handicapped child's physical health in the program offered by the school system, or when the educational authorities involved acted in bad faith by failing to comply with procedural provisions of the Act in an *egregious* fashion (emphasis supplied). In the instant case, however, such circumstances were neither alleged nor factually involved. Instead, it was the risk of the health of others that was of concern to the educational authorities, not the physical health of the child; and the educational authorities did not act in bad faith by failing to comply with the procedural provisions of the Act.

Moreover, it is inconsistent under the Act, applicable regulations and the case law of the Eighth Circuit to find that compensatory education was not available relief, as the Supreme Court of Nebraska did in the *Deist* case, but in the same breath hold that money damages may be recovered.

In *Miener* the appellants argued that compensatory educational services were prospective and equitable in nature, and were distinguishable from monetary damages. In response the Eighth Circuit stated:

> Often, as is the case here, the line between prospective and retrospective relief may not be bright. * * * Appellant seeks such compensatory services from the state as are necessary "to overcome the effects of any wrongful denial of special educational services." The eleventh amendment bars such services if they are a form of retroactive compensation "measured in terms of a monetary loss resulting from a past breach of legal duty." * * * On the other hand, the eleventh

> amendment is no bar if the relief appellant seeks can fairly be characterized as "a necessary consequence of compliance in the future with a substantive federal question determination." * * *
>
> An award of tuition reimbursement would clearly be barred as an award of damages for past breach of legal duty under this test. * * * We view the request for compensatory services as practically indistinguishable from a request for such reimbursement. Compensatory services, like the award of a money judgment, would be measurable against past educational deprivation. The expenditure of state monies to provide compensatory services would not, in other words, ensure "*compliance in the future* with a substantive federal question determination." *Edelman v. Jordan, supra*, 415 U.S. at 668, 94 S. Ct. at 1358 (emphasis added). We conclude that the eleventh amendment bars the award of such compensatory relief as appellant has requested.

While *Miener* was weighing the right to compensatory services as against the State of Missouri, the crucial fact is that both the logic and the case law of the Eighth Circuit dictate that there is no distinction between monetary reimbursement and compensatory educational services. It therefore was inconsistent for the Supreme Court of Nebraska in *Deist* to conclude that federal law does not allow compensatory education, and at the same time hold it does authorize the payment of money damages to the parent of a handicapped student.

In order that it might be determined whether the Supreme Court of Nebraska has correctly construed the Education of all Handicapped Children Act, or whether

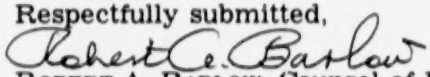
the Eighth Circuit has, a decision of this Court is necessary to clarify whether compensatory education and tuition reimbursement are really the same forms of relief.

It is asserted by the petitioners herein that they are and that the Supreme Court of Nebraska erred in not so finding.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska be granted because such state court of last resort has construed the federal Education of All Handicapped Children Act in a way in conflict with decisions of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



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APPENDIX A

ADAMS CENTRAL SCHOOL DIST. V. DEIST

214 Neb. 307, ____ N.W.2d ____ (1983)

No. 81-773 — filed May 13, 1983.

1. **Schools and School Districts: Special Education: Appeal and Error.** The courts, in reviewing special education appeal proceedings under Neb. Rev. Stat. §§ 43-661 et seq. (Reissue 1978), are not to make independent findings of their own but must follow the criteria set forth in Neb. Rev. Stat. § 84-917 (Reissue 1981) and determine if the action was supported by substantial and competent evidence and was neither arbitrary nor capricious.

2. **Schools and School Districts: Special Education.** A state which accepts financial assistance from the federal government under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), is obligated to provide all handicapped children with a free appropriate public education.

3. _____: _____. A free appropriate public education requires that each handicapped child be given the opportunity to achieve such child's full potential commensurate with the opportunity provided to other children.

4. _____: _____. When a handicapped child is sent home from a school setting and is not allowed to return, such child has been expelled from the school.

5. _____: _____. The expulsion of a handicapped child from school constitutes a change in placement, and when that occurs the procedural protections of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 to 1415 (1976), are to be followed.

6. _____: _____. Local school officials are prohibited, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), from expelling students whose handicaps cause them to be

disruptive; in such a case a school may only transfer the disruptive student to an appropriate, more restrictive environment.

7. _____: _____. The burden rests with the local school officials to produce evidence as to whether or not the student involved was expelled for behavior due to such child's handicap.

8. _____: _____. A school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.

9. _____: _____. The state is not obligated under either the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976) or the state care and education of handicapped children legislation, Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978), to provide a free appropriate public education beyond the child's 21st birthday.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

This action began as a special education hearing brought pursuant to 20 U.S.C. § 1415 (1976) and Neb. Rev. Stat. § 43-661 (Reissue 1978) before the Nebraska Department of Education. Marvin and Myrtle Deist brought this action on behalf of their son David against Adams Central School District No. 090 (Adams Central), Educational Service Unit No. 9 (ESU No. 9), and the Nebraska Department of Education (NDE), alleging that David had been denied a free appropriate public education. The NDE was dismissed as a party at the administrative level.

After a hearing was held, the hearing officer, Michael Sullivan, found that David had been denied a free appropriate public education. Sullivan ordered the appellees to provide David with a residential placement near his home, to pay for David's past placement in the Hastings Regional Center and the Nebraska Psychiatric Institute, and granted David 16 additional months of free appropriate public education as compensation for education he failed to receive in the past.

Adams Central and others appealed the hearing officer's decision to the District Court of Adams County, Nebraska, which reversed the decision of the hearing officer. That court found David to be entitled to classroom placement without any residential care other than by his parents; that Adams Central is not liable for the costs of David's placement in the Hastings Regional Center or the Nebraska Psychiatric Institute, as such placement was voluntary and without the consent of Adams Central; and that David is not entitled to 16 months' additional free appropriate public education as compensation for education missed in the past.

The Deists have appealed, assigning several errors in the decision of the District Court. They complain that the District Court erred (1) in holding that a day educational program could provide David with free appropriate public education; (2) by failing to hold that David was unlawfully excluded from public school; (3) by not ordering residential placement for David; (4) by failing to assign primary responsibility for David's education to appellees; (5) in holding that David was voluntarily placed in the Hastings Regional Center and the Nebraska Psychiatric Institute; (6) by denying appellants reimbursement for the cost of that place-

ment; and (7) in denying David any compensatory education.

There is no real dispute as to the facts in this case. David Deist was born July 25, 1963. His early development was fairly normal. In 1966, after David began to exhibit some antisocial behavior, the Deists had him examined by Dr. Frank Menolascino of the Meyer Children's Rehabilitation Institute in Omaha and by Dr. Michael O'Neill of the Norfolk Regional Center. At that time both of these doctors described David as autistic. Twice a week during the next 2 years David received services from the Norfolk Regional Center. When he reached the age of 6 the Deists moved to Hastings, and there David began attending school at the School for the Trainable Mentally Retarded (TMR School) and the Hastings Regional Center, one-half day each. Eventually David attended a full-day program at the TMR School. When he was 12, in approximately 1976, he developed grand mal epilepsy. The general consensus of the experts who have examined David is that he suffers from autism or organic brain syndrome, mental retardation, and epilepsy.

In the fall of 1977 David began exhibiting increasingly destructive and disruptive behavior at school and at home. As a result of this behavior he became increasingly difficult to handle at school. On approximately December 21, 1977, David was sent home from school early. Mrs. Deist testified that a note was sent home with David stating, in short, that he could not return to school until his behavior was altered.

On December 22, 1977, the Deists met with the local school officials to discuss David's placement. Mrs. Deist testified that it was her understanding from this

meeting that David would not be permitted to return to the TMR School and that there was no available suitable placement for David at that time. This was confirmed by the testimony of Don Sutton, supervisor of special education of the trainable mentally handicapped, who said that he was not surprised when David did not come back to school in December because "I think we had requested that they keep him home." He also confirmed that at the meeting with the parents they were told that David was going to have to stay home because he was just unmanageable. On December 28, 1977, unable to care for him at home, the Deists placed David in the Hastings Regional Center.

As early as January 4, 1978, Thom Pickton, a social-emotional consultant at ESU No. 9, who had worked with David, recommended: "The most appropriate or ideal placement for David at this time would be a completely structured 24-hour setting incorporating the use of applied behavioral techniques such as premacking, time-out, contingency management, etc." Pickton also observed that David's aggressive behavior had increased after an increase in his seizure medication had been prescribed. Similar recommendations calling for a 24-hour-per-day structured program for David were also made by other ESU No. 9 staff members in the first few months of 1978, and Mr. Sutton agreed that ESU No. 9 undertook no actions on the basis of those recommendations. He also conceded that at the January 23 meeting he did have objections to David's returning to the TMR School because he did not think he was ready. No homebound instruction was given to David during the month of January because he could not find any teacher to work with him. After January 30 Mr. Sutton said that he found a

friend of his to work with David, a person who at the time was working for a bakery, who was not a certified teacher of any sort but did have a degree in business. Therefore, while at the regional center David received, at best, 2 hours of educational instruction per day.

While in the regional center David deteriorated greatly, losing many of the skills he had mastered prior to his being placed there. Members of the ESU No. 9 staff, Adams Central staff, and the Deists met monthly during David's stay at the regional center to discuss his placement. No alternative placement for David was made, even though it was agreed that the regional center was not the appropriate place for David. Finally, the regional center staff, in May of 1979, informed the Deists that their only option was to move David to the state institution in Beatrice and that this would have to be done by May 10, 1979.

David's parents visited the facilities at Beatrice in April, and Mrs. Deist testified that the children's cottage facilities were nice, modern, and up-to-date, and they seemed to have an adequate staff working with the various group homes. However, when asking about arrangements to place David, they were told that there was a long waiting list, over a year's time. The only thing available, they were told, was a locked male ward. The parents concluded that this was not a satisfactory placement for their son.

According to the evidence, the Deists were told that David could not remain at the Hastings Regional Center after May 10. At that time the Deists moved David to the Nebraska Psychiatric Institute (NPI) in Omaha. This was done as a result of joint efforts and

with the support of ESU No. 9 and Adams Central, although it was the Deists who located this placement and transferred David thereto. David remained in the NPI until the time of hearing, March 10, 1980. There is no evidence in the record indicating what has happened to David since that time.

There are several substantive issues presented on this appeal. First, we must determine the appropriate standard of review in this matter. Neb. Rev. Stat. § 43-666 (Cum. Supp. 1982) provides for appeals from the decision of the hearing officer in cases such as this. It states: "Any party aggrieved by the findings, conclusions, or final decision and order of the hearing officer is entitled to judicial review under sections 84-917 to 84-919. Orders of hearing officers are enforceable in appropriate proceedings in the courts of this state."

Neb. Rev. Stat. § 84-917 (Reissue 1981) provides for review of the hearing officer's decision by the District Court. Subsections 5 and 6 of that statute provide how that decision may be reviewed: "(5) The review shall be conducted by the court without a jury on the record of the agency.

"(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

"(a) In violation of constitutional provisions;

"(b) In excess of the statutory authority or jurisdiction of the agency;

"(c) Made upon unlawful procedure;

"(d) Affected by other error of law;

"(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

"(f) Arbitrary or capricious."

Neb. Rev. Stat. § 84-918 (Reissue 1981) describes this review as "de novo on the record."

When interpreting these statutes we have held that only a limited review of the findings of the agency is provided for. In *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973), we had an opportunity to determine the meaning of "de novo" review under these statutes: "The plaintiff contends that the provisions of section 84-918, R.R.S. 1943, providing for de novo review in this court, mean that we examine the record and reach an independent conclusion without reference to the findings of the commission or those of the District Court. The commission contends that our review of its decision is governed by the criteria of section 84-917(6), R.R.S. 1943, as is the review by the District Court.

"The statute does not make clear which meaning is intended. We believe the commission's contention is essentially correct. If, for example, under criteria (6)(e) there is before the commission substantial evidence which would support a finding either way, neither the District Court nor this court should disturb the commission's finding. In such a case and where fact findings under criteria (6)(e) are involved, we review

the decision of the District Court only to determine that it and the commission have applied the proper criteria, and it is in this sense that we review de novo." 190 Neb. at 764-65, 212 N.W.2d at 346-47.

Under these statutes the courts are only to give limited review to determine if the agency's decision was supported by competent evidence, if it was arbitrary or capricious, etc. The reviewing court may not make independent findings of its own. This being the applicable standard of review in this matter, we need only determine if the hearing officer applied the proper rules of law in this case to reach a decision which is supported by competent evidence in the record.

The laws governing the educational rights of the handicapped are found in both federal and state law. The Education for All Handicapped Children Act of 1975 (the Act), 20 U.S.C. §§ 1401 et seq. (1976), represents the federal body of law, and the care and education of handicapped children is provided for in Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978) on the state level. The Act is a funding statute under which the federal government supplies financial assistance to the states for the education of handicapped children. By accepting these funds the state implicitly agrees to meet certain criteria and requirements. See *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part and rev'd in part* 645 F.2d 592 (8th Cir. 1981). In short, the Act requires each state that accepts these funds to provide all handicapped children with a free appropriate public education.

"The Act provides for funds to be distributed to the states electing to participate under its provisions. In making the election a state has to satisfy the Commis-

sioner of Education that it 'has in effect a policy that assures all handicapped children the right to a free appropriate public education.' 20 U.S.C. § 1412." *Hines v. Pitt County Bd. of Ed.*, 497 F. Supp. 403, 405 (E.D. N.C. 1980). It is interesting to note that the court in *Hines* points out in a footnote that all states have elected to accept these federal funds except New Mexico.

Defining what a free appropriate public education is, § 1401(18) states: "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

The specific requirements in each given case, when determining what is appropriate, will, of course, depend upon the needs and abilities of each individual involved. " 'This standard would require that each handicapped child be given the opportunity to achieve his full potential commensurate with the opportunity provided to other children.' " *Springdale School Dist. #50 v. Grace*, 656 F.2d 300, 304 (8th Cir. 1981).

In this case the record contains a great deal of evidence concerning what is the appropriate educational setting for David. As pointed out above, Thom Pickton and other ESU No. 9 staff members recommended a 24-hour structured environment for David when he first left the Adams Central schools. Dr. John

McGee testified that he worked with David while at the NPI. Dr. McGee is the special assistant to the director of the Meyer Children's Rehabilitation Institute and project director for the Nebraska Chapter for the Society of Autism in the development of programs for autistic children and adults, and has had 12 years' experience in teaching and working with handicapped children and adults. When asked what type of educational program David would most benefit from, Dr. McGee said: "A-. . . From my working with David and observing other people like David around the country and other programs around the country, my recommendation would be that David needs a total educational program. In other words, from the time he gets up in the morning until the time he goes to bed in the evening, during that thousand minute waking day David should be in a developmental educational structured, intensive kind of program. The way functionally or practically I would see that working would be, number one, he should be in a highly structured classroom setting with a well trained teacher, and we've some teachers who through minimal intensive practical training pick up the skills that a person with his needs requires. So, he would be in that kind of classroom setting working on, I think, a mix of cognitive skills, academic skills, prevocational skills, self-care types of skills. And then, in conjunction with that, a concurrent educational program in an out-of-home community based, residentional [sic] facility that would work in conjunction with the classroom setting which David was in and would reinforce a lot of the things that he was involved in, so that you would end up with a total educational program. David does need structure, there's no doubt about it. David needs a type of setting where he can be involved in learning all day long. And I think if we were to do that, that

across time that degree of structure he needs would decrease but at the onset we need that type of flexibility built into his program. Q- And I guess it's my understanding from what you have been saying is that the residential component of the program is an integral part of the whole educational program for David. A- No doubt about it."

When asked if this type of environment could be provided in the home, Dr. McGee said he felt a home situation could not offer a sufficiently controlled environment to facilitate David's needs. Testimony was also taken from a Dr. Michael O'Neill. He is a certified general and clinical psychologist and is an adviser to the Nebraska Society for Autistic Children. Dr. O'Neill had worked with David at the Norfolk Regional Center. When asked his opinion as to whether a residential component would be an integral part of a structured education for David, he said: "A- I think that a residential program would be essential to his education at this point. Q- Can you explain the reason for that feeling? A- The kinds of learning that David needs will be very difficult to accomplish in simply a classroom setting. While it may be possible to achieve some control over his behavior and his skill level within the classroom, within the confines of the classroom, experience and research with autistic children has shown a considerable difficulty they have in generalizing to the rest of their world experience. They seem to be able to discriminate areas that they need to behave and learn and areas that it's unnecessary for them. If David is to establish any of the skills and competencies set out in the I.E.P. as a part of his general level of functioning, that will have to be on a twenty-four hour a day basis."

Finally, the testimony of Dr. Frank Menolascino was taken in deposition form. He is associate director of the Nebraska Psychiatric Institute and has been associated therewith for 20 years. He worked a great deal with David while at the NPI. Dr. Menolascino's opinion is in accord with Dr. McGee's and Dr. O'Neill's as to what David's needs are, that is, a residential, group-home type setting. The evidence recommending David be given this type of educational setting is uncontradicted by any other evidence in the record.

On the basis of this evidence the hearing officer Sullivan found "residential placement in or near this community [Hastings, Nebraska] is a necessary element of free and appropriate public education to which David Deist is entitled to under the law." This finding is permissible under the law.

"It is clear that the Act contemplates residential placement under some circumstances, and that when a residential placement is necessary for educational purposes, 'the program, including non-medical care and room and board, must be at no cost to the parents of the child.' 45 C.F.R. § 121a.302." *Kruelle v. Biggs*, 489 F. Supp. 169, 173 (D. Del. 1980). See, also, *Gladys J. v. Pearland Independent School Dist.*, 520 F. Supp. 75 (S. D. Tex. 1981). This finding is supported by the substantial evidence set out above that was before the hearing officer.

As pointed out above, review by this court and the District Court in this case is limited. We are only to determine if the hearing officer's decision is supported by the evidence, is proper under the applicable law, and if it is arbitrary or capricious. We determine, on

a review of the entire record, that the decision of the hearing officer granting residential placement to David Deist is permissible under the law, is supported by substantial and competent evidence, and is neither arbitrary nor capricious. Therefore, we find that portion of the hearing officer's order which granted David residential placement was proper, and it is reinstated.

We turn now to the question of whether the Deists should be reimbursed for the costs they incurred while David was in the Hastings Regional Center and the NPI. To answer this question we must first determine if David's removal from the Adams Central schools was voluntary, a suspension, or an expulsion.

As pointed out above, Mrs. Deist testified that on the day David was sent home in December of 1977 she had a note indicating the school would not allow him to return. She also testified that after the meeting of December 22, 1977, with the school officials it was her impression that David could not return to school. Mr. Don Sutton, supervisor of the school David attended, testified that he shared the belief that David could not return to school. Mr. Sutton also testified as to a meeting held on January 23, 1978. He said that at that time he felt David could not return to school. On February 16, 1978, another meeting was held to consider alternatives for David. At that time return to the TMR School was not considered as a possible alternative. Meetings like these continued throughout 1978, at which alternatives for David's education were discussed. His return to the TMR School was never offered as an alternative. This evidence clearly supports the hearing officer's finding that David was expelled from the TMR School.

When a handicapped child is expelled, this constitutes a change in placement. When a change in placement occurs, the procedural protections of the federal act, §§ 1401 to 1415, are to be followed. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). These procedures were not followed in this case.

Also, local school officials are prohibited, under the federal act, from expelling students whose handicaps cause them to be disruptive. In such a case the school may only transfer the disruptive pupil to an appropriate, more restrictive environment. *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978). In this case there is no evidence which definitely states what caused David's disruptive behavior, although there is some indication that it may have been due to the increase in the medication he was taking. The lack of such evidence does not give rise to an inference that expulsion was appropriate. Rather, the burden is on the state to produce evidence as to whether the student involved was expelled for behavior due to his handicap or not. *S-1 v. Turlington, supra.*

In light of the above authority David was not only expelled but he was expelled improperly. The question now becomes what relief, if any, may be afforded the Deists in light of this improper expulsion. The case of *Boxall v. Sequoia U. High Sch. Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979), gives some guidance. In that case Frank Boxall tried to obtain an educational placement with the local school district for his autistic son. The district informed Boxall that no program was available for his son, and denied him any placement. For 2 years after this denial Boxall paid a private tutor to work with his son. Finally, Boxall

brought an action under, among other federal statutes, the Education for All Handicapped Children Act of 1975 and the Rehabilitation Act of 1973, as did the Deists in this case. Boxall sought to secure a free appropriate public education for his son and to recover the cost of the private tutor.

Discussing whether this cost was recoverable or not, the court said: "First, the Education of the Handicapped Act again provides its own complementary remedies. As noted before, it expressly contemplates a private right of action to review the decision on what constitutes an appropriate education for a handicapped person. It is not completely clear from the wording of the statute whether it implies an action for damages. Section 615(e)(2) of the Act, 20 U.S.C. § 1415(e)(2) simply gives aggrieved individuals the right to bring a civil action. *See also* 45 C.F.R. § 121a.511. Some light is shed, however, by the available legislative history of this right to review, which was adopted initially by the Conference Committee. It was not originally part of the Senate bill, and the House provision was also somewhat different. The Committee Report indicates that no limitation on damages actions was intended. It states that: 'Such action may be brought in any State court of competent jurisdiction or in any district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearings), shall hear additional evidence at the request of any party, shall make an independent decision based on the preponderance of the evidence, and *shall grant all appropriate relief.* [Emphasis added.]' Joint Explanatory Statement of the Committee of Conference, in Senate Conference Report No. 94-455, p. 50,

reprinted in [1975] U.S. Code Cong. and Admin. News, pp. 1425, 1503. This statement suggests very strongly that, when appropriate, compensatory damages may be awarded. Since this action is under the Education of the Handicapped Act as well as the Rehabilitation Act, the court does have the authority to award damages." *Id.* at 1112.

Viewing the legislative history of the federal act and the *Boxall* decision, it seems that compensatory relief may be appropriately granted under the Act. Such a position is in keeping with Nebraska law. See Neb. Rev. Stat. § 43-662.01 (Cum. Supp. 1982), which states that "the hearing officer shall prepare a final decision and order directing such action as may be necessary."

To determine when compensatory relief may be granted, the decision in *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), is helpful. *Doe* presented a case where a handicapped child was expelled from school. The expulsion was appealed. One of the issues raised was whether or not the child or his parents could recover damages. That court concluded that this issue need not be reached at that time, but added in dicta that possible recovery depended upon the answer to three questions: "Whether the plaintiff is entitled to compensation depends on whether the school has caused him to lose any education. Whether the school has caused the plaintiff to lose any education depends on whether he would have been expelled even if the appropriate procedures had been followed. And whether he would have been expelled even if the appropriate procedures had been followed depends on whether his propensity to disrupt was the result of his inappropriate placement." *Id.* at 229.

In the present case the hearing officer found the school did cause David to lose education; that he would not have been expelled if the appropriate procedures had been followed; and that his propensity to disrupt was due to his placement. There is evidence in the record to support these findings. As pointed out above, David was improperly expelled from the TMR School, as the appropriate procedures under the Act were not followed. No alternative placement was offered by the school district. This deprived David of education.

All the evidence at the hearing relevant to what placement David needs states that he needs a structural residential placement, not what he received at the TMR School. Dr. Menolascino testified that David made great strides while at the NPI in reducing or eliminating the disruptive behavior. From this the hearing officer could find that David's propensity to disrupt was the result of his inappropriate placement. If the proper procedures had been followed this inappropriate placement would have been discovered. Under the idea of "appropriate education" the answer then would have been to offer David a different placement rather than simply expel him from school.

From this evidence the hearing officer could find that the three elements from *Doe* are present in this case. Since there would be evidence present from which the hearing officer could find the test from *Doe* had been met in David's case, it would be proper for him to find that the Deists are entitled to compensation for moneys expended for David's placement.

The appellees in their brief cite the case of *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979) in support of the proposition that damages are not permissible

under the Education for All Handicapped Children Act of 1975. That case was, in part, an action in tort alleging negligence on the part of the individual school board members because a child's learning disabilities were not properly diagnosed, and, as a result, that negligence has made it virtually impossible for the student to function at his full intellectual capacity. In rejecting that contention the court said: "The thrust of federal legislation in the field of special education has been to provide financial assistance to the states, in their effort to provide each one of their handicapped children with an appropriate education. Recognition of a private remedy for damages, as alleged in this instance, would compel these programs to shift their focus. Insulation of school officials from liability would take precedence over the implementation of innovative educational reforms. Recognition of the plaintiff's claim would cause special education programs to suffer, since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should these innovations fail." *Id.* at 115. The case which we have under consideration does not involve innovative action, it involves inaction, and is one for reimbursement, not for general damages.

Also cited by appellees is the case of *Jaworski v. Rhode Island Bd. of Regents for Ed.*, 530 F. Supp. 60 (D. R.I. 1981), which did in fact seek reimbursement for the parents because of a failure to provide a proper placement of a handicapped child. The court relied on *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), in concluding that "the better view is that money damages are *not generally available* under the EAHCA." (Emphasis supplied.) *Id.* at 64.

Anderson did say that. However, the following quotation from *Anderson* is particularly applicable to the instant case: "Although we hold that the statute was not intended generally to provide a damage remedy for an incorrect placement decision, we can envision at least two exceptional circumstances in which a limited damage award might be appropriate. In those situations it is likely that Congress, though generally requiring that a child remain in his current placement, 20 U.S.C. § 615(e)(3), would have intended that parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.

"The first such circumstance was addressed in *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981). There a child's physical health would have been endangered had the parents not made alternative arrangements to those offered by the school system. . . . In our view, when a court subsequently determines that the services in dispute were necessary to protect the physical health of the child and also were services that should have been provided by the school district, the district court has the statutory authority to recompense parents for the costs of those services the school district failed to provide." *Id.* at 1213-14.

Although criticized by the *Jaworski* court, nevertheless *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D. Neb. 1980), contained this language: "The Education of All Handicapped Children Act specifically creates a private cause of action which may be brought in federal court. In resolving such lawsuits, the Court is

empowered by the Act to 'grant such relief as the court determines is appropriate.' 20 U.S.C. § 1415(e)(2). This language indicates that the Court has broad authority in granting relief under the Act. This conclusion is reinforced by the Act's legislative history, which states that 'the court . . . shall grant *all* appropriate relief.' *Joint Explanatory Statement of the Committee of Conference*, S. Rep. No. 94-455, 94th Cong., 1st Sess., at 50, *reprinted in* U.S. Code Cong. and Admin. News, at p. 1503 (1975). This language in the Act and its legislative history strongly suggest that the Court may award damages under the Act when such relief is deemed to be appropriate. *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). Moreover, recovery of the cost of tuition in the instant case would further the Act's purpose. This expenditure for tuition was allegedly made because of the defendant's failure to comply with the Act's procedural requirements. If these claims are proved, recovery of this cost will further the Act's purpose of ensuring that all handicapped children receive a free appropriate education. In other words, the defendants would be required to pay the costs of Daniel's education and thus provide Daniel with a free education as the Act requires. *Compare Loughran v. Flanders*, *supra*, 470 F. Supp. at 115 (which held that a plaintiff could not recover damages for emotional injury or future lost earnings because such recovery would hinder fulfillment of the Act's purpose.) Thus, this Court finds that if Monahan proves his claim under the Act, an award of damages may be appropriate to compensate him for the cost of the George Norris placement." *Id.* at 1094.

We conclude that a school district, responsible for providing a "free appropriate public education" to a

handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.

We therefore reverse the order of the District Court and reinstate that of the hearing officer regarding the reimbursement to the Deists of their cost incurred in placing David in the NPI and the Hastings Regional Center.

Turning to the issue of compensatory education, we find no support for the findings of the hearing officer in the relevant law. The Act, by its clear and unambiguous language, limits eligibility to children ages 3 to 21. § 1412(2)(B). There is no authority under this statutory scheme by which the hearing officer could grant free appropriate public educational benefits to David beyond his 21st birthday. As such, this grant was an abuse of the hearing officer's discretion. That portion of the District Court's opinion which overrules the grant of compensatory education by the hearing officer is affirmed.

AFFIRMED IN PART, AND
IN PART REVERSED.

APPENDIX B

Constitution of the United States, Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

45 C.F.R.

§ 121a.194 Withholding.

(a) If a State Educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 300.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 300.592.

(20 U.S.C. 1414(b)(2))

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(b); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

Priorities in the Use of Part B Funds

§ 121a.320 Definitions of "first priority children" and "second priority children."

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (Instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services

(such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Nebraska Revised Statutes (Reissue 1978)

43.625. State Board of Education; review special training and educational programs; qualified teacher, defined. The State Board of Education shall review special training and educational programs offered by or in conjunction with any public school district, combination of public school districts, educational service unit, or combination of educational service units subject to the following:

(1) The teacher or teachers in any such special program shall be qualified;

(2) Teacher aides, working with any such program, shall have such qualifications as the governing body of the school shall prescribe and shall participate in appropriate in-service activities; and

(3) Each qualified teacher shall be responsible for the direct supervision of teacher aides, whose duties shall be limited to those prescribed in section 79-1233.

As used in this section, qualified teacher shall mean an individual holding a valid State of Nebraska teaching or special services certificate with an endorsement appropriate to the handicaps served. If such teacher is serving children with more than one handicap, qualified teacher shall mean an individual holding a valid State of Nebraska teaching or special services certificate with an endorsement in at least one of the handicaps served.

Source: Laws 1967, c. 246, § 1, p. 650; Laws 1972, LB 690, § 12; Laws 1973, LB 403, § 15; Laws 1974, LB 863, § 4; Laws 1976, LB 761, § 4.

43-626. Special education or treatment; residential care; cost. Whenever a child is forced to have temporarily the school district of which the child is a resident in order to attend an appropriate special education program and must reside in a residential facility, boarding home, or foster home for the duration of the special education program the State of Nebraska shall provide for the ordinary and reasonable cost of the residental care during the duration of the special education program. The state shall not be required to pay such cost unless placement of the child in a special education program requiring residential care was made by the resident school district with prior approval by the State Department of Education. The provisions of this section shall not apply to state-level treatment facilities operated by the Department of Public Institutions.

Source: Laws 1967, c. 243, § 1, p. 646; Laws 1972, LB 690, § 13; Laws 1973, LB 403, § 16; Laws 1978, LB 871, § 1.

20 U.S.C.

§ 1414. Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the

jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular

educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs

carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Commissioner under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisified that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

Consolidated applications

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may

receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

Special education and related services provided directly by State educational agencies; regional or State centers

(d) Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with

other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Reallocation of funds

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

Pub.L. 91-230, Title VI, § 614, Apr. 13, 1970, 84 Stat. 181; Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 784.

Historical Note

1975 Amendment. Pub.L., 94-142, effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions the process through which local educational agencies and intermediate educational units desiring to receive payments submit applications to the appropriate State educational agency and so as to eliminate former provisions covering State matching funds.

Effective Date of 1973 Amendment. Complete revision of this section by section 5(a) of Pub.L. 94-142 effective Oct. 1, 1977, see section 8(e) of Pub.L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-230, see 1970 U.S.Code Cong. and Adm.News, p. 2768. See, also, Pub.L. 94-142, 1975 U.S. Code Cong. and Adm.News, p. 1425.

APPENDIX C

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA

ADAMS CENTRAL SCHOOL DISTRICT #090, Adams County, Nebraska, and EDUCATIONAL SERVICE UNIT #9,	DOCKET 67
	PAGE 34
Petitioners,	CASE NO. 20634
V.	
MARVIN DEIST and MYRTLE DEIST, and the NEBRASKA DEPARTMENT OF EDUCATION,	**AMENDED PETITION FOR REVIEW**
Respondents.	

COME NOW the petitioners, and each of them, and pursuant to § 43-666 R.R.S. 1943 and § 84-917 R.R.S. 1943, and for their Amended Petition for Review from the Final Decision and Order of the hearing officer in a case heard before the Nebraska Department of Education and designated as Case No. 79-08 in which Marvin Deist and Myrtle Deist were designated as petitioners, and the petitioners herein, and each of them, and the Nebraska Department of Education were named as respondents, and allege as follows:

1. That on or about the 2d day of July, 1979, respondents herein, Marvin and Myrtle Deist, filed their Petition with the Nebraska Department of Education.

2. That on or about the 5th day of July, 1979, Hearing Officer Mr. Michael E. Sullivan filed Notice to File

Answer to Adams Central School District #090, Adams County, Nebraska, Educational Service Unit #9, and the Nebraska Department of Education.

3. That on or about the 9th day of July, 1979, the Nebraska Department of Education filed its Special Appearance in the case.

4. That on or about the 16th day of July, 1979, your petitioners, and each of them herein, filed their Answer in the above said Case No. 79-08.

5. That on or about the 14th day of November, 1979, Marvin and Myrtle Deist filed their Amended Petition in the above said case.

6. That on or about the 19th day of February, 1980, petitioners herein, and each of them, filed their Answer to said Amended Petition.

7. That on or about the 7th day of March, 1980, the above said hearing officer sustained the Demurrer filed previously to March 7, 1980, wherein respondent Nebraska Department of Education was dismissed from the proceedings in the above said case.

8. That commencing on the 10th day of March, 1980, and through March 13, 1980, a hearing was held in the above said case.

9. That on or about the 22d day of September, 1980, the Hearing Officer issued his Final Decision and Order, which Final Decision and Order was received by your petitioners herein, and each of them, on or about the 23rd day of September, 1980.

10. That the said Final Decision and Order, a copy of which is attached hereto and incorporated by reference herein as if fully set forth and which is designated Exhibit "A" should be reversed or vacated for the reason that your petitioners, and each of them herein, have been prejudiced by said decision in one or more of the following manners:

(a) The said Final Decision and Order is in violation of constitutional provisions, both as to the Constitution of the State of Nebraska and the United States Constitution;

(b) The said Final Decision and Order is in excess of statutory authority and jurisdiction of said agency;

(c) The said Final Decision and Order was made upon unlawful procedure;

(d) The said Final Decision and Order is affected by error of law;

(e) The said Final Decision and Order is unsupported by competent material and substantial evidence in view of the entire record as made on review;

(f) The said Final Decision and Order is arbitrary and capricious;

(g) The said Final Decision and Order is in excess of the statutory authority and jurisdiction of the Hearing Officer;

(h) The Hearing Officer abused his discretion in excluding certain evidence at the said hearing in the above said matter;

(i) The Hearing Officer abused his discretion based upon the evidence in making the said Final Decision and Order above referred to;

(j) The said Final Decision and Order is con-

trary to federal law in that the ultimate responsibility for providing a program such as is sought in this case when the local educational agency is unable to do so falls upon the State Department of Education which was not a party to the adjudication made by the Final Decision and Order of the hearing officer as hereinabove said;

(k) The said Final Decision and Order as hereinabove said is contrary to the rules and regulations of the Nebraska Department of Education which were in effect at the time said Final Decision and Order was made, which rules and regulations are binding upon both petitioners herein. The said Final Decision and Order is in violation of the constitutional provisions both as to the Constitution of the State of Nebraska and the United States Constitution in that it affords a free public education to David Deist beyond the age of 21 and is in that manner violative of equal protection for those other patrons of petitioners Adams Central School District #090 and Education Service Unit #9;

(l) The hearing officer abused his discretion in excluding certain rebuttal evidence offered by petitioners herein at the time of the hearing which evidence was submitted as an offer of proof but which evidence can now be located as part of the transcript from the hearing below;

(m) The said Final Decision and Order of the hearing officer is affected by error of law and is arbitrary and capricious in that it was made absent all the necessary parties being present before the hearing officer at the time the hearing occurred;

(n) The said Final Decision and Order is con-

trary to law in that implementation of the Order would cause both petitioners herein to exceed their spending authority as provided by law.

WHEREFORE, your petitioners herein, and each of them, pray the Court to, upon a review of said Final Decision and Order reverse and vacate said Final Decision and Order with all costs taxed to the respondents, Marvin Deist and Myrtle Deist, and further pray the Court for such other and further relief as may be just and equitable.

ADAMS CENTRAL SCHOOL DISTRICT #090,
Adams County, Nebraska, and
EDUCATIONAL SERVICE UNIT #9,
Petitioners,

BY: BARLOW, JOHNSON, DeMARS &
FLODMAN, Their Attorneys
1227 "J" Street
P.O. Box 81686
Lincoln, Nebraska 68501
(402)475-4240

BY: s/ John F. Recknor
For the Firm

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA

ADAMS CENTRAL SCHOOL DISTRICT #090, Adams County, Nebraska, and EDUCATIONAL SERVICE UNIT #9,	)	DOCKET 67
	)	PAGE 34
Petitioners,	)	CASE NO. 20634
V.	)	
MARVIN DEIST and MYRTLE DEIST, and the NEBRASKA DEPARTMENT OF EDUCATION,	)	**ORDER**
Respondents.	)	

On the 14th day of May, 1981, the above captioned matter came on for trial before the Court. Appellants Adams Central School District, also known as District No. 90 of Adams County, Nebraska, and Educational Service Unit No. 9 were represented by their attorney, John F. Recknor, and the respondents, Marvin Deist and Myrtle Deist, were represented by their attorney, Jeff Jacobsen. Respondent Nebraska Department of Education filed an Answer herein but did not appear at the trial. Evidence was adduced and the Court being fully advised in the premises generally finds for petitioners and against respondents Marvin Deist and Myrtle Deist and further specifically finds as follows:

1. David Deist, minor child of respondents Marvin Deist and Myrtle Deist, was in an educational placement at the school for the Trainable Mentally Handicapped in Hastings, Nebraska, which school was being operated by Educational Service Unit No. 9, and edu-

cational services were being delivered by the school to said David Deist pursuant to a contract for services existing between Educational Service Unit No. 9 and Adams Central School District.

2. On or about December 27, 1977, Marvin Deist and Myrtle Deist placed said David Deist at the Hastings Regional Center without the prior knowledge and consent of or consultation with Adams Central School District or Educational Service Unit No. 9.

3. David Deist remained in the voluntary placement at Hastings Regional Center from approximately December 27, 1977 until approximately May 11, 1978, and during that period of time, Educational Service Unit No. 9, pursuant to its contract with Adams Central School District, provided educational services for said David Deist at the Hastings Regional Center.

4. On or about May 11, 1978 until March 10, 1980 said David Deist was in a placement at Nebraska Psychiatric Institute. This placement was made by Marvin Deist and Myrtle Deist without the prior knowledge and consent of or consultation with Adams Central School District or Educational Service Unit No. 9, and during that period of time educational services were provided to said David Deist, which educational services were paid for by Adams Central School District.

5. David Deist has not been in his educational placement as provided by an individualized educational plan, which plan was accepted and signed by Myrtle Deist on October 17, 1977, and he has remained out of that placement without the consent of Adams Central School District and Educational Service Unit

No. 9 from approximately December 27, 1977, through March 13, 1980, the final date of the hearing from which this appeal was taken.

6. The placements at Hastings Regional Center and Nebraska Psychiatric Institute constituted voluntary placements by Marvin Deist and Myrtle Deist for which Adams Central School District and Educational Service Unit No. 9 should not be obligated to pay.

7. That David Deist is entitled to educational services from Adams Central School District and Educational Service Unit No. 9 pursuant to his individualized educational plan which was accepted and signed October 17, 1977, and in effect before December 27, 1977.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that David Deist shall immediately be transferred from the Nebraska Psychiatric Institute, Omaha, Nebraska, and is entitled to receive educational services in the classroom for the school for the trainable mentally handicapped in Hastings, Nebraska, which is residential care to be provided by his parents Marvin Deist and Myrtle Deist; provided, however, that Marvin Deist and Myrtle Deist may elect to make such other placement of David Deist as they shall deem appropriate; and they are hereby directed to notify Gil Feis of Educational Service Unit No. 9 or Orwin White, Superintendant of Adams Central School District, of their intention to return David to the school for the Trainable Mentally Handicapped in Hastings, Nebraska, or of such other intention to not return him to said school, as their decision may be, within 40 days of the entry of this order. In the event they elect to have David Deist returned to the school for the Trainable Mentally Handicapped, transportation such as is

required to transfer him from Nebraska Psychiatric Institute to the residence of Marvin Deist and Myrtle Deist shall be provided by and paid for in full by Adams Central School District.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither Adams Central School District nor Educational Service Unit No. 9 shall be responsible for any payment of any residential expenses incurred by Marvin and Myrtle Deist for David Deist at the Hastings Regional Center or at the Nebraska Psychiatric Institute, or for any expenses of any nature except those which may have been or may be expressly provided for by any existing contract between Adams Central School District and Nebraska Psychiatric Institute; and Adams Central School District and Educational Service Unit No. 9 are hereby discharged from any obligation to provide any expense of any nature for said David Deist from December 27, 1977.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that that portion of the hearing officer's Final Decision and Order entered on or about September 22, 1980 directing Adams Central School District to provide David Deist with a free appropriate public education for a period of 16 months after David Deist's twenty-first birthday is hereby reversed and vacated.

The costs of this action shall be paid by the parties who have incurred them.

Dated this 12th day of June, 1981.

BY THE COURT:
s/ Fred Irons
District Judge

APPROVED AS TO FORM:
s/ John F. Recknor
Attorney for Petitioners

_____
Attorney for Respondents